BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PHILIP REYES Claimant VS. **MCLANE FOOD SERVICES, INC.** Respondent AND **NEW HAMPSHIRE INSURANCE CO.** Insurance Carrier	)	Docket No. 1,029,541

ORDER

Claimant requested review of the October 2, 2006, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge (ALJ) found there is insufficient evidence to show that claimant's right knee complaints were caused or aggravated by his work-related left knee injury. Claimant's application for medical treatment for his right knee was denied. The order is silent concerning claimant's request for additional treatment to his left knee, but claimant does not raise that omission as an issue on appeal.

On appeal, claimant argues that the evidence was sufficient to show that his injury to his left knee led to the symptoms and need for treatment of his right knee.

Respondent and its insurance carrier (respondent) contend that the claimant was not consistent when he testified about when his right knee pain started and is, therefore, not credible. Respondent argues that claimant's right knee condition is not a direct and probable consequence of the original injury and, accordingly, the ALJ's order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant is 43 years old and has worked as a driver for respondent for 14 years. Claimant delivers products to fast food restaurants. He is required to help unload, which requires him to stack cases of product onto a two-wheeler and take them down a 26-foot ramp. The job involves lifting weights of 20 to 50 pounds and requires bending, stooping, climbing, squatting, kneeling, walking and standing. He is not required to load the trailers.

On September 8, 2005, claimant slipped and fell, injuring his left knee. He reported the injury to his supervisor but said he would wait a week to let his supervisor know if he needed medical treatment. Two weeks later, claimant told his supervisor that he needed medical treatment, and respondent sent him to Occupational Health through the Kansas University Medical Center.

Claimant was first seen at Occupational Health on October 14, 2005. He was told that he probably had something more than a strain and was scheduled for an MRI but was released to return to work at full duties. Claimant was next seen at Occupational Health on January 9, 2006. He was told that the MRI showed he had a tear to his medial meniscus and a possible bone contusion. He was referred to Dr. Daniel Weed, an orthopedic surgeon, and was again returned to work without restrictions.

Claimant testified that he had difficulty performing his regular work with the injury to his left knee. He did not have any flexibility in his left knee, and when he needed to pick up items from the floor, he had to squat with his left knee in an awkward position. He tried to keep his left leg protected as much as possible when coming down the ramp with a two-wheeler in his hand. In doing so, he put more weight on his right leg.

Claimant was seen by Dr. Weed on January 27, 2006. An arthroscopy was performed on claimant's left knee on March 9. Thereafter, Dr. Weed sent claimant to physical therapy. Claimant returned to work at full duty with assistance on March 29, 2006. Dr. Weed released him as being at maximum medical improvement on April 21, 2006.

Claimant testified that he told his supervisor that Dr. Weed released him to return to work with assistance, and his supervisor more or less said they would have to see about that. Claimant indicated that respondent had a newly hired driver who was training with another driver. Claimant suggested that he be allowed to train the new driver so the new driver could assist him in the physical duties of unloading the trailer. The new driver was not made available to claimant, however, and claimant went back to full duties by himself. He has been working at full duty since that time. His right knee continues to give him problems. Claimant said it stiffens and gets sore. At times he needs to pop it back in

place. Claimant said his right knee is worse now than it was at the time of his surgery on his left knee.

Although claimant contends he spoke with his physical therapist about the pain in his right knee, respondent introduced a statement from one of claimant's physical therapists, Thomas Schaecher, who said he did not recall claimant mentioning problems or pain in his right knee. Claimant said, however, that one of Mr. Schaecher's assistants normally gave him his physical therapy treatments and that he told that assistant about his right knee condition. For purposes of the preliminary hearing, claimant stipulated that the physical therapy records do not mention any problems claimant was having with his right knee.

Claimant testified that he told Dr. Weed about the pain in his right knee sometime after the surgery on his left knee. There is no mention of claimant's right knee in the medical records from Dr. Weed attached to the preliminary hearing. During cross-examination, claimant agreed that there is no mention of a problem with his right knee in Dr. Weed's records until August 8, 2006. It is apparent that the record does not contain a complete copy of Dr. Weed's records.

On cross-examination, claimant stated that the first date he experienced pain in his right knee was one or two weeks after the March 9, 2006, surgery on his left knee. At the time, he was sitting in a chair at his home icing his left knee. Respondent introduced a report from claimant's personal physician, Dr. Everett Koehn, dated January 23, 2006. Dr. Koehn's report indicates that claimant complained to him about pain in his right knee. Claimant stated that he had misunderstood respondent attorney's question concerning when he first started having pain in his right knee. Claimant's Application for Hearing, which is dated March 31, 2006, alleges injuries to both lower extremities.[1]

Claimant testified that he had no previous medical treatment to his knees before the injury of September 5, 2005.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,[2] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows

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[1] Form K-WC-E-1 Application for Hearing filed June 21, 2006.

[2] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972); *see also Logsdon v. Boeing Co.,* 35 Kan. App. 2d 79, 128 P.3d 430 (2006); *Casco v. Armour Swift-Eckrich*, 34 Kan. App. 2d 670, Syl. ¶ 2, 128 P.3d 401 (2005).

> from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

Claimant relates his right knee condition to his left knee injury, but the medical evidence is equivocal. Although claimant's testimony alone is sufficient evidence to establish his own physical condition and the existence, nature, and extent of the injury,[3] his testimony is not consistent as to the onset of his symptoms. Furthermore, the claimant's medical records contain a history of a preexisting right knee problem.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5]

Claimant's right knee condition may be work related, either as a new accident resulting from his repetitive work activities over time or as a natural consequence of his left knee condition due to overcompensation. However, this record proves neither scenario to be more probably true than not true. Claimant has not met his burden of proof.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding, decision and order of this Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated October 2, 2006, is affirmed.

IT IS SO ORDERED.

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[3] *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999); *Hardman v. City of Iola*, 219 Kan. 840, 845, 549 P.2d 1013 (1976); *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[4] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[5] K.S.A. 2005 Supp. 44-508(g).

[6] K.S.A. 44-534a.

[7] K.S.A. 44-555c(k).

Dated this _____ day of February, 2007.

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BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge